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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 231

ARKANSAS NATURAL GAS CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 828), affirming a divestment order of the Securities and Exchange Commission ("the Commission") under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 ("the Act"), 15 U. S. C. § 79k (b) (1), is reported in 154 F. 2d 597. The findings and opinion of the Commission (R. 594), dated May 5, 1944, are not yet officially reported but are set forth in the Commission's Holding Company Act of 1935 Release No. 5028.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on March 22, 1946 (R. 832). Rehearing was denied on May 15, 1946 (R. 837). The petition for a writ of certiorari was filed on June 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 347, which is made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. § 79x (a).

QUESTION INVOLVED

Whether the Commission, in limiting petitioner to an integrated gas utility system pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, properly ordered the divestment of petitioner's large oil enterprise (including production, transmission, refining and marketing—treated together as a single business by petitioner's request), as a non-utility business which did not meet the statutory standards for retention by a registered public utility holding company.

STATUTE INVOLVED

Section 1 (c) of the Act, 15 U. S. C. § 79a (c), declares it

> * * * to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, * * *.

In Section 1 (b) (4), 15 U. S. C. § 79a (b) (4) it is

> * * * declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—
>
> * * * * *
>
> (4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; * * *"

Section 2 (a) (5), 15 U. S. C. § 79b (a) (5), defines a "public utility company" to mean "an electric utility company or a gas utility company."

Section 2 (a) (4), 15 U. S. C. § 79b (a) (4), defines a "gas utility company" to mean

> Any company which owns or operates facilities used for the distribution at retail * * * of natural or manufactured gas for heat, light, or power. * * *

Section 11 (b) (1), 15 U. S. C. § 79k (b) (1) provides:

> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsid-

iary company thereof, shall take such action as the Commission shall find necessary *to limit the operations of the holding-company system* of which such company is a part *to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the reten-

tion of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems. [Italics supplied.]

STATEMENT

Petitioner, Arkansas Natural Gas Corporation ("Arkansas Natural") is admittedly subject to Section 11 (b) (1) as a registered public utility holding company itself[1] and as a subsidiary of Cities Service Company ("Cities Service") which is also a registered holding company.[2] The proceedings before the Commission involved the ap-

[1] Petitioner registered under the Act on April 22, 1938. Its holding company system comprises the following companies:

Arkansas Natural Gas Corporation
1. Arkansas Louisiana Gas Company
Gas Advisers, Inc.
2. Arkansas Fuel Oil Company
Arkansas Pipe Line Corporation
Arkansas Transit Corporation
Orange State Oil Company
Petroleum Advisers, Inc.
The Penn Wyo Trust
The Atlantic Oil Company
The Columbus Oil Company
The Phebus Oil Company
3. Lisbon Gasoline Company, Inc.
4. Transark Oil & Gas Company

[2] Cities Service registered under the Act on January 29, 1941.

plication of Section 11 (b) (1) to the entire Cities Service system and required Cities Service to divest itself of all interest, direct or indirect, in the oil business. Cities Service petitioned for review of that order but afterwards withdrew its petition.[3] The opinion and findings of the Commission deal at length with its reasons for ordering the divestment by Cities Service of its vast oil enterprises and incorporates those findings with a brief restatement thereof with respect to the required divestment by Arkansas Natural of its interest in the oil business (R. 597, 649, 653).

The utility business of Arkansas Natural is the retail gas distribution enterprise of its subsidiary, Arkansas Louisiana Gas Company ("Arkansas Gas") (R. 73, *et seq.*).[4] Arkansas Gas also owns and operates facilities for the production and transmission of natural gas (R. 49, *et seq.*), which facilities the Commission found were retainable under the Act by virtue of their close relationship to the public utility, i. e., retail distribution facilities, of the company (R. 651).

In addition to its gas operations, Arkansas Natural is engaged also in all phases of the oil busi-

[3] For a fuller discussion of this aspect of the case, see notes 9, 30, *infra*.

[4] As previously noted, *supra* p. 3, Section 2 (a) (4) defines a "gas utility company" as one "which owns or operates facilities used for the *distribution at retail* * * * of natural or manufactured gas for heat, light, or power." [Italics supplied.]

ness. In stating that petitioner's non-utility subsidiaries operate "largely within the area of the gas company's operations," the petition (p. 5) gives an inadequate picture of the geographical extent of this oil business and its relationship to the gas business. The non-utility business which the Commission ordered divested includes the extensive production, transportation, refining and marketing business of Arkansas Fuel Oil Company ("Arkansas Oil"), another subsidiary of petitioner (R. 5 (20), 653).[5] In contrast to the gas distribution system of Arkansas Gas, which is located in a relatively compact area in Eastern Texas, Arkansas and Northern Louisiana (R. 73, *et seq.*, 651), Arkansas Oil does business in a much greater area comprising the states of Kentucky, Tennessee, Alabama, Mississippi, Georgia, South Carolina, North Carolina, Virginia, Florida, as well as Arkansas, Louisiana and Texas (R. 415–16). It produces, transports and refines crude oil, and markets petroleum products (R. 408). It owns oil leases, pipe lines, an oil refinery, gasoline plants and other facilities incident and appurtenant to the petroleum business (R. 408). It markets its refined products, both at retail and

[5] Also ordered divested were two other small subsidiaries of petitioner, *viz.*, Lisbon Gasoline Co., Inc., which owns a small natural gasoline extraction plant in East Texas, and Transark Oil & Gas Co., which owns and operates a single gas well in Wyoming. The record contained no evidence that the operations of either company were in any way related to the utility business of Arkansas Gas (R. 655).

through jobbers, under Cities Service trade names throughout the South and Southwest (R. 414–16).* It has eight subsidiaries: Arkansas Pipeline Corporation and Arkansas Transit Corporation, both oil transmission companies; Orange State Oil Company, an oil products marketing company operating in Florida; a minority interest in Petroleum Advisers, Incorporated, a service company which services the oil subsidiaries of the entire Cities Service system; and four inactive companies owning oil and gas producing properties, namely, Penn-Wyo Trust and its subsidiaries, The Atlantic Oil Company, The Columbia Oil Company and The Phebus Oil Company (R. 550, *et seq.*, 652).

This oil business, while slightly smaller in terms of plant investment, is substantially larger

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*Gasoline, the principal product of the oil company, is distributed both through company tank stations and independent jobbers. The following table shows the volume of sales in the respective States of distribution on an annual basis (as of the time of the hearing), the number of company tank stations and the number of independent jobbers in each State (R. 415–16).

	Barrels of gasoline	Company stations	Independent jobbers
Texas	302,000	21	2
Arkansas	334,000	49	3
Louisiana	578,000	49	4
Mississippi	270,000	40	3
Kentucky	61,000	1	7
Tennessee	218,000	8	18
Alabama	218,000	9	25
Virginia	258,000		21
North Carolina	250,000		28
South Carolina	154,000		17
Georgia	294,000	4	35
Florida	805,000	62	3

in terms of gross operating revenues than the public utility and non-public utility business of Arkansas Gas, which the Commission permitted petitioner to retain. Thus, as of December 31, 1941, Arkansas Gas had a plant and investment account of $52,935,654, and for the calendar year 1941 this company reported gross operating revenues of $8,462,759. By comparison, as of September 30, 1941, Arkansas Oil had a plant and investment account of $37,251,432, and for the year ending December 31, 1940, the gross operating revenues of it and of its subsidiaries were $21,545,454 (R. 157, 220, 608, 620, 650, 652). As these figures illustrate, the oil business of Arkansas Oil is a large one, both by absolute standards and by comparison with the entire utility and non-utility gas business of Arkansas Gas which petitioner is permitted to retain under the Commission's order.

Petitioner tendered no issue as to the retention of such portions of the oil business (*viz.*, production and conditioning) as might be related to the gas business controlled by petitioner through Arkansas Gas. Rather, it sought to justify retention of the oil business in its entirety (R. 610, 619, 653). In its effort to show a relationship of the latter to the operations of its public utility business, petitioner of necessity was forced to trace an attenuated chain of relationships, beginning with the retail gas distribution

properties which made Arkansas Gas a public utility company within the meaning of the Act.[7] There was, first, the relationship between that retail gas distribution business and the production and transmission of natural gas which the Commission found sufficiently substantial to justify retention of the gas properties in their entirety (R. 651).[8] Next, there was the relationship between the production of gas and the production of oil which the Commission also recognized to be of substantial importance, although finding it unnecessary to rule upon the retainability of the oil production properties severed from the balance of the oil business since no issue was tendered as to retainability on this basis (R. 610–611, 619, 653–4). Finally, there were the relationships in the production of oil, its transmission to refineries,

[7] See *supra* n. 4.

[8] Because of the substantial relationship between the gas production and transmission properties on the one hand, and the retail distribution business on the other, the Commission permitted retention of the entire gas properties. It did not accept petitioner's contention that the production and transmission facilities were part of petitioner's integrated public utility system, the Commission's theory being that, in any event, they were reasonably incidental to the retail gas business (R. 651). In the appeal to the court below, petitioner took exception to the Commission's failure to find that the gas production and transmission properties were part of its integrated utility system, but the court ruled that these properties were non-utility properties and were retainable only under the "other businesses" provisions of Section 11 (b) (1) (R. 830). The petition for certiorari takes no further issue on this aspect of the case.

refining and the marketing of the refined oil throughout the South and Southwest. It also appeared that the oil business of petitioner is but part of the larger continent-wide oil business controlled by Cities Service (R. 607, 610). It is now settled that this oil business must be separated from the public utility enterprises of Cities Service, including the gas utility system controlled by petitioner.[9] Petitioner's products are marketed under the Cities Service trade names (R. 609, 652) and, through Arkansas Oil, petitioner owns 17% of the capital stock of and receives services from Petroleum Advisers, Inc., which renders services to the various non-utility subsidiaries in the Cities Service system that are interested in the oil business (R. 224, 648).

It was against this background that the Commission was required to evaluate what petitioner has characterized as "undisputed" testimony with respect to the financial advantages which it attributed to, and claimed would be lost by a severance of, the existing common management be-

[9] The Commission's order in the present proceedings required Cities Service to confine its operations to a certain defined integrated gas utility system, and to a gas production and transmission company found to be retainable under the "other businesses" clauses. *Cities Service Company*, Holding Company Act Release No. 5028 (1944) (R. 594, et seq.). Thereafter, Cities Service requested a modification of that order which would permit it to comply with the Act and the order by disposing of its utility interests. This request was granted. *Cities Service Company*, Holding Company Act Release No. 5350 (1944).

tween Arkansas Gas and Arkansas Oil. We indicate below (pp. 18 *et seq.*) why the Commission was warranted in attaching relatively little weight to this "testimony."

In concluding that petitioner could not retain its interest in the oil business as a unified whole, the Commission made its determination in the alternative (R. 620–622, 653–654). It followed, first, what it regards as the proper interpretation of the two "other businesses" provisions of Section 11 (b) (1), which interpretation requires a showing that the other business be related to the operations of the retainable public utility business.[10] It applied, secondly, a different interpretation, with which it disagrees but with which petitioner is in accord, set forth in the opinion of the Court of Appeals for the District of Columbia in *Engineers Public Service Company, et al.* v. *S. E. C.*, 138 F. 2d 936 (1943),[11] which interpreta-

[10] This construction had been upheld by the Circuit Court of Appeals for the Second Circuit in *North American Company* v. *S. E. C.*, 133 F. 2d 148 (1943), but the interpretative issue was not brought to this Court, certiorari being granted on the issue of constitutionality only, 318 U. S. 750 (1943). The judgment was affirmed on April 1, 1946. No. 1, Oct. Term, 1945.

[11] Certiorari granted, 322 U. S. 723 (1944). Oral argument was heard during the October, 1945 Term. Reargument is scheduled for this Term.

As more fully developed in the briefs in that case, the issue before the Court of Appeals was the correctness of the Commission's ruling that Engineers could not retain along with the electric utility properties of Virginia Public Service Company serving a large portion of the State of Virginia, trans-

tion does not require such operational relationship if the Commission can make the affirmative finding that retention of the non-utility business is not detrimental to the functioning of the retainable utility system and is necessary or appropriate in the public interest or for the protection of investors or consumers. The application of the statutory standards for retention of the non-utility interests is first discussed in that portion of the Commission's opinion dealing with the Cities Service oil and gas situation (R. 620–622), this discussion being later incorporated by reference in the portion dealing with the subsidiary holding company system of petitioner, Arkansas Natural, and its oil enterprises (R. 653). With

portation properties in the Norfolk area which were relatively minor asset-wise and as a source of income. In holding these transportation properties not retainable, the Commission had relied primarily upon the absence of a relationship "to the operations of" such "integrated public utility system(s)" as those words are used in the two "other businesses" provisions of Section 11 (b) (1), and had concluded that such operating relationship was necessary to retention within the meaning of both clauses read together. The Court of Appeals construed the second "other businesses" provision as a relaxation of the first and ordered the case remanded to the Commission on the theory that under that Court's construction the Commission might have found, despite the absence of any operating relationship, that the transportation properties in question were retainable as "necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems" under the concluding clause of the second "other businesses" provision.

particular reference to the retention of the Cities Service oil business in its entirety but also applicable to the issue tendered by petitioner here, the Commission noted that "Acceptance of respondents' contention that the statute permits a combination of holdings such as these would result in a distortion of the perspective of the Act. In reality the respondents are asking us to find that a relatively small gas distributing business is reasonably incidental to a vast non-utility business * * *" (R. 617). The Commission then reiterated its statement in the *North American* case that: "In the ordinary case, therefore, we believe the statute contemplates that after compliance with Section 11 (b) (1) the integrated systems retainable by a registered holding company will constitute its primary business and that retainable non-utility interests will occupy a clearly subordinate position" (R. 617).[12]

The Commission also gave consideration to the respects in which the Circuit Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia differed in their in-

[12] See note 11 *supra* and compare the statement of this Court in the *North American* case, that the purpose of Section 11 (b) (1) is that "other [i. e., nonutility] holdings may be retained only if their retention is related to the operations of the retained utility properties" (slip opinion, p. 6), and that "holding companies are compelled to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties" (slip opinion, p. 11).

terpretations of the "other businesses" provisions of Section 11 (b) (1), but concluded that, under either interpretation, the oil enterprises were not retainable. Thus, the Commission's opinion and findings stated (R. 621–2):

> We need not, in this case, make a choice between the variant readings. In both reviewed cases the non-utility businesses sought to be retained were relatively minor. No problem comparable to that presented here was before either court. Neither court was required to determine whether, upon any reading of the statute, large, complicated, self-contained, unitary oil production, transmission and distribution businesses could be retained together with relatively minor utility assets. Certainly the Court of Appeals for the District of Columbia did not decide that this legislation could be made only incidentally a system of regulating public utility holding companies by an acceptance of the respondents' contentions.

Specifically, as regards petitioner's oil business, the Commission noted (R. 653–4):

> * * * We have considered earlier in this opinion the requirements demanded of any business claimed to be "reasonably incidental, or economically necessary or appropriate" to the operations of a public-utility system. We cannot conclude that the Arkansas Oil business meets those requirements. *Nor can we find, even if we*

were required to read the "second other business" clause as an exclusive standard, that the requirements of the Act have been met. [Italics supplied.]

The Commission's order was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on a construction of the statute assumed by petitioner—with which assumption we do not presently take issue—to be in accord with that of the Court of Appeals for the District of Columbia (R. 828). However, like the Commission, the court found that, even under the construction more favorable to petitioner, no case had been made out for the retention of petitioner's oil business. Following denial of rehearing by that court, the instant petition for certiorari was filed.

ARGUMENT

1. Contrary to petitioner's assertion, this case presents no question as to the proper construction of the "other businesses" provisions of Section 11 (b) (1). The Commission has heretofore stated to this Court that the proper interpretation of the "other businesses" provisions of Section 11 (b) (1) is a question of substantial public importance.[13] Our opposition to the instant petition is

[13] The Commission sought certiorari on this question in the *Engineers* case. Certiorari was granted both on the petition of the Commission and on the cross petition of Engineers which was filed with respect to other rulings in the case which upheld the views of the Commission. Subsequently, there

solely because we do not agree with petitioner that those questions are presently involved. As noted above, the Commission made its decision in the instant case after the judgment of the Court of Appeals for the District of Columbia in the *Engineers* case, and rested its decision in the alternative: first, upon its own interpretation of the statute which had been rejected by the Court of Appeals for the District of Columbia; and, secondly, upon the interpretation adopted by that court in that case, upon which petitioner relies.[14]

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was voluntarily divested from the Engineers system the transportation business which was specifically discussed in the ruling of the Court of Appeals, rendering the issue moot except as to the possibility that the interpretative question may yet be involved as respects other non-utility properties which are owned by certain companies whose divestment was ordered by the Commission, but which order is subject to review by this Court. Engineers has filed certain plans with the Commission involving, *inter alia*, divestment of these remaining non-utility properties which would render the interpretative issue entirely moot. These plans, however, are under consideration by the staff and have not been approved by the Commission.

[14] Thus, contrary to petitioner's allegations (Pet., p. 12), the decree of the court below is not at all in conflict with that of the District of Columbia Court of Appeals in the *Engineers* case in failing to remand the matter to the Commission for further findings in light of what it considered to be the correct construction of Section 11 (b) (1). In the *Engineers* case the Commission's findings had been predicated upon a construction which was inconsistent with that adopted by the Court of Appeals. In the instant case, however, the determination of the Commission was alternatively based on both competing constructions of the Act.

For the same reason, denial of certiorari will not, as the

2. The record before the Commission revealed a holding company system which combined a highly speculative, large oil business covering twelve states throughout the South and Southwest, with a comparatively small, stable natural gas utility business operating in a compact area in Eastern Texas, Arkansas and Northern Louisiana. The Commission also found that, apart from the production and conditioning of gas and oil, both involving non-utility facilities under the statutory definition, there was no relationship between the two businesses other than common ownership and joint management which, of course, could exist with respect to the most divergent types of businesses. (R. 613, 634–635.) Moreover, the Commission had before it a statute whose stated purpose was to eliminate the evils which Congress found to exist when the composition of a public utility holding company system bore "no relation to economy of management and operation or the integration and coordination of related operating properties". Furthermore, the legislative history, discussed below pp. 23–27, clearly indicated that a specific purpose of Congress in

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petition alleges (p. 15), deprive petitioner of its assumed right to retain its oil business in the event of an affirmance by this Court in the *Engineers* case. The interpretative issue may now be moot in that case (see *supra*, n. 13), but if not, an affirmance on the construction of the Court of Appeals can result only in remanding that case to the Commission for further findings in accordance with such construction. In the instant case divestment was ordered even under that construction of the statute.

enacting Section 11 (b) (1) was to separate a large oil business such as petitioner's from common ownership and management with a natural gas utility enterprise. Such factors formed the basis for the Commission's conclusion that it could not make the necessary affirmative finding that retention of petitioner's extensive and ramified oil business in its entirety was "necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of" its retainable public utility system.

These undisputed facts make relevant what this Court observed in the *North American* case that "Congress has concluded from the extensive studies made prior to the passage of the Act that the economic advantages of a holding company at the top of an unintegrated, sprawling system are not commensurate with the resulting economic disadvantages" (slip opinion, p. 15). Petitioner's evidence was in no way calculated to show anything unusual about the relationship between its utility system and the extensive oil properties ordered divested, such as might warrant an exception from the overriding policy of Section 11 (b) (1).[15] The Commission, accordingly, was

[15] See the statement of this Court in the *North American* case that Congress adopted Section 11 (b) (1) for the purpose of compelling holding companies "to divest themselves of security holdings of geographically and economically unrelated properties" (slip opinion, p. 11).

warranted in giving relatively little weight to the alleged financial savings and benefits of common management and joint use of operating personnel stressed by petitioner in its effort to preserve the *status quo*. Taken at face value, these savings would only amount to 0.98% of the gross expenses of the oil business and 3.6% of the gross expenses of the gas business.[16] Considering the fact that there are so many intangibles which must be taken into account in any attempt to trace the ultimate relation of such expenditures to net income, and the failure of petitioner's estimates to give any consideration to compensatory factors involved in the separation of the two businesses, these relatively low percentages of gross expenses only serve to emphasize the inherent unreliability of petitioner's hypothesis that the amounts involved could be translated into correspondingly greater percentage savings in ultimate net incomes. As stated by Circuit Judge Swan in the *North American* case, 133 F. 2d, at 152, "whether economy is achieved by centralized control is always a doubtful question." As previously noted, petitioner's estimates took no account of countervailing factors, including advantages to be derived

[16] Petitioner estimated an increase of approximately $182,000 in the annual operating expenses of the oil business and approximately $223,000 in the operation of independent gas facilities (R. 569). 1940 expenses amounted to $18,426,605 for the oil company (R. 157) and $6,093,741 for the gas company (R. 145).

from the employment of executives and office personnel who would devote their entire attention to the affairs of the gas system which would produce results fully worth the additional salary expenses, or the disadvantages incident to setting up the oil business as a separate business, independent of Cities Service, with the necessity for developing its own trade names and marketing arrangements, which might outweigh any temporary disadvantages of severance at the point of contact between the natural gas and oil businesses of petitioner.[17]

Nor did these estimates take into account the disadvantage from the point of view of petitioner's oil business of having it enmeshed in a system of regulation primarily adapted to holding companies in the public utility field.[18] Thus, even from the

[17] Petitioner's estimates of increased expenses incorrectly assumed the continued existence of Arkansas Natural as an integral part of the Cities Service system and failed to take into account the fact that Cities Service has indicated its intention to dispose of all of its gas utility properties. See *Cities Service Company*, Holding Company Act Release No. 5350 (1944) and n. 9, *supra*. If Arkansas Natural were not to separate its oil and utility properties, then Cities Service would have to dispose of its entire interest in Arkansas Natural, including the oil business presently involved.

[18] Prior to the passage of the Act, spokesmen for companies interested in both the natural gas and oil businesses clearly recognized that the strict regulation provided in the Act was inappropriate for a business as highly competitive and speculative as the oil business, where even a small amount of delay incident to Commission supervision might handicap essential business dealings. See, *e. g.*, the statement of R. W.

viewpoint of the interests of its own existing investors, petitioner made an inconclusive showing.

3. The basic weakness of petitioner's showing was the attempt by what was only opinion testimony, although reduced to dollars and cents estimates, to negative the basic economic philosophy and policy of the Act [19] as applied to the combination of a gas utility system and a large oil enterprise such as are found in the present case. Thus,

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Gallagher of Standard Oil Company that "It is not the purpose and intent of this bill (i. e., S. 1725) to regulate the oil business", and that "the provisions of the statute * * * make it actually impracticable and impossible for an oil company to register and comply with the law." *Hearings before the Senate Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. (1935), p. 962 (hereinafter called "*Senate Hearings*"); see also *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423*, 74th Cong., 1st Sess. (1935), part 3, p. 1704 (hereinafter called "*House Hearings*"). The inappropriateness of the statute as a mechanism for the regulation of the oil business was also noted by the Commission in its findings and opinion (R. 619).

[19] As previously indicated, Section 1 (c), 15 U. S. C., § 79a (c) states—

"* * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section * * *."

The problems and evils so enumerated include the adverse effect on the national public interest and the interest of investors and consumers which Congress found may result—

"* * * when the growth and extension of holding companies bears no relation to economy of management *and operation* or the *integration and coordination of related operating properties.*" (Section 1 (b) (4), 15 U. S. C., § 79a (b) (4)). [Italics supplied.]

petitioner did not indicate how the Commission could have reconciled with the philosophy and legislative history of the Act the retention of its oil business as consistent with the public interest and not detrimental to the functioning of its system.

Prior to the passage of the Act, the National Power Policy Committee had recommended to the President that—

> Holding companies should be restricted as soon as practicable to the business of operating and of owning the securities of public-utility properties; they should not be permitted to engage in non-utility or speculative ventures.[20]

As stated by Senator Wheeler, one of the sponsors of the Act, Section 11 (b) (1) was devised for the purpose of requiring "utility holding companies to get out of the myriad of speculative non-utility adventures in which they have been promiscuously active in the past."[21]

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[20] H. Doc. No. 137, 74th Cong., 1st Sess. (1935), p. 10.

[21] 79 Cong. Rec. 10847. Thomas G. Corcoran, a draftsman of the present Act, also stated during the course of the hearings before the Senate Committee (*Senate Hearings*, p. 202):

"The bill also attempts to simplify the problems of the investor by encouraging a simple capital structure and a simple company so far as its property interests are concerned, so that when the investor buys into this greatest of all our industries he will buy into a company in which the security structure is simple enough so that he will know what he is getting, *and, furthermore, he will buy into a public utility operating-company business and nothing else. He will not*

The Commission pointed out in its findings and opinion (R. 618) that, prior to the passage of the Act, holding company representatives had brought the relationship between the oil and natural gas utility businesses to the attention of the congressional committees since they recognized that separation of the two businesses would be required if the bill were enacted into law. They presented extensive testimony—in many respects similar to that offered by petitioner in the instant case—in an effort to persuade Congress to permit the continued combination of these businesses.[22] At the hearings before the House Committee, their testimony was offered in connection with Section 7(a) of H. R. 5423 which, together with Section 2(a)(4) of that bill, provided a broader definition of the gas public utility business than that which was finally enacted into law, for it included production and transmission in addition to the distribution of natural gas, thus including a phase of the gas business which is operationally related to the production of oil. Respecting this proposal, Mr. Ralph W. Gallagher, of the Standard Oil Company of New Jersey, stated:

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be buying into the gasoline business, and he will not be buying into half a dozen other unrelated businesses which, buying as the average investor buys securities, he would not completely understand he was going into." [Italics supplied.]

[22] *E. g.*, see *House Hearings*, Part 3, pp. 1704–06, 1799, 1865; *Senate Hearings*, pp. 202, 662, 668, 685, 959, 961, 962.

> *A company having an interest in subsidiaries engaged in the oil business would be prohibited from having an interest in natural gas utility companies* * * *. it is not the purpose and intent of this Bill to regulate the oil business. It is clearly the intent that the public utility business shall be separated from all other businesses * * *[23]

A printed brief issued by a committee representing the natural gas industry noted with regard to H. R. 5423:

> *By this section [7 (a)] a combination of the oil and gas businesses is prohibited.*[24] [Italics supplied.]

Section 8 (a) of the Senate proposal (S. 1725) contained the same provision as Section 7 (a) of the House bill already noted. At the hearings before the Senate Committee, Mr. Ralph B. Feagin, appearing on behalf of the committee representing the natural gas industry, stated:

> * * * it seems to us very clearly to be the meaning of that section that *a company that is engaged primarily in the oil business under this act will be forced to*

[23] *House Hearings*, Part 3, pp. 1704–05. The same comment of Gallagher appears in a prepared statement submitted to the Senate Committee, which appears in *Senate Hearings*, p. 961.

[24] *House Hearings*, Part 3, pp. 1798–99. A similar statement with reference to Section 8 (a) of the Senate bill is contained in a brief filed by the same committee which appears in *Senate Hearings*, p. 959.

> *dispose of its interest in the natural gas business* * * *
> * * * The segregation is in the form of isolation of the natural-gas business from the oil business and the electric business.[25] [Italics supplied.]

Mr. J. R. Munce, Vice President of the petitioner, Arkansas Natural, complained also that under S. 1725 "the present centralized operations would have to be broken up."[26]

As in the present case, industry representatives then placed great emphasis on the operational relationship in the production of oil and gas. As noted in the Commission's opinion (R. 618), this, however, failed to impress the legislators as a sufficient reason for permitting the continued combination of a large unified oil business and a gas utility enterprise. Thus, Senator Wheeler, Chairman of the Senate Committee, stated:

> I do not see any reason why, for instance, an oil company that produces gas should not be able to separate the oil from the gas, and sell the gas to a gas company.[27]

Senator Couzens, a member of the Committee, also remarked:

> I am not trying to segregate the production of oil and gas, but rather I am interested

[25] *Id.*, pp. 662–663. For a similar statement, see also *id.*, p. 670.

[26] *Id.*, p. 975.

[27] *Id.*, p. 665.

> in the question after it leaves the wells. I have a very great ambition to separate them so far as they serve the public interest after they leave the wells. * * * [28]

In light of the over-all purpose of Section 11 (b) (1) and the specific legislative history noted above, the Commission concluded, first with regard to the Cities Service system (R. 618):

> The Act, as it affects the issues in this case, is the result of careful deliberation on the very problems here presented. It was the intention, manifest in the Act as passed, that the retention of an oil business together with a gas distribution business be permitted only upon the showing of a relation between the two, in specific cases, which would warrant such retention.[29] And it was not the intention to make the Act a means of absorption of relatively minor utility

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[28] *Id.*, p. 669. The legislative history also reveals a subsidiary purpose of the statute to provide free competition between oil and gas companies in the heating field. Thus, Senator Wheeler stated during the course of the Senate Hearings (*Id.*, p. 671):

"The theory upon which the bill is drawn is that there should be competition among these different heating facilities and methods."

[29] Such was the case of the *Lone Star Gas Corporation*, 12 S. E. C. 286 (1942), where the Commission permitted retention of an oil interest in connection with a natural gas public utilities system. That case involved *only oil production* which was merely a by-product of the gas operations and was smaller in size than the utility operations. There was no oil business as such.

> enterprises by vast industrial combinations. We cannot find that the oil business is "reasonably incidental, or economically necessary or appropriate" to any utility operations in the Cities system.

With regard to the holding company system of the petitioner, Arkansas Natural, the Commission noted (R. 653):

> * * * The same fundamental reasons which applied in the Cities Service Oil situation apply here to forbid the retention of Arkansas Oil * * *
>
> * * * as in the case of Cities Service Oil, the link at which the oil company is joined to the utility is oil production, which is merely a portion of the operations of the business claimed to be retainable. The business *as a whole*—and we are asked to consider it as a whole—cannot be said to possess the statutory relation to the utility operations of Arkansas Gas.
>
> We could not find otherwise consonantly with the purposes and history of the Act. * * *

Since the passage of the Act, every registered holding company other than petitioner which had a major investment in the oil business has complied with divestment orders of the Commission and has either divested itself of its oil business or has entered upon a program of separation of the oil and gas businesses pursuant to the statu-

tory mandate.[30] Petitioner's lone attempt to challenge such a divestment order, therefore, presents no issue of general applicability to combinations of oil and gas properties.

CONCLUSION

The decision of the court below is correct and no question is presented which would warrant

[30] Cities Service and Standard Oil Co. of N. J., both major oil companies and holding companies within the definition of the Act, each filed an application for exemption under Section 3 (a) (3), 15 U. S. C., § 79c (a) (3), as being "only incidentally a holding company" and primarily engaged in the oil business. Both applications were denied. (*Cities Service Company*, 8 S. E. C. 318 (1940); *Standard Oil Company* (New Jersey), 10 S. E. C. 1122 (1942).) Thereafter, Standard Oil made certain corporate changes designed to effect the disposition of its utility interests which was accomplished pursuant to Commission order. (*Standard Oil Company* (New Jersey)), Holding Company Act Release No. 4617 (1943). As indicated *supra*, n. 9, the Commission's original order in the instant proceedings involving the entire Cities Service system of which Arkansas Natural is a constituent part, required the divestment of Cities Service's oil properties. Upon Cities Service's request, that order was modified to permit the company to comply with the Act by disposing of its utility interests. (*Cities Service Company, Holding Company* Act Release No. 5350 (1944).) While the opinion suggests disposition of "its holdings in all utility companies," Cities Service has represented that it intends to dispose of its utility holdings only to the extent necessary to obtain an exemption under Section 3 (a) (3). However, no intimation has been given that it would claim such an exemption if it retains its indirect interest in Arkansas Gas.

further review by this Court. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

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